(1)

89-409

No. _____

In The

Supreme Court of the United States

October Term, 1989

CITY OF MILWAUKEE, et al.,

Petitioners,

v.

CLAYTON K. YEUTTER,
Secretary of Agriculture, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Section 901(b)(1) of the Cargo Preference Act of 1954 (46 U.S.C. § 1241(b)(1)) provides a preference for U.S.-flag vessels in the ocean carriage of the federal government's non-military cargo "to the extent such vessels are available at fair and reasonable rates. . . . " The questions presented for review by the Court are:

1) Whether, in order for a U.S.-flag vessel to be deemed "available" for purposes of § 901(b)(1), that vessel must be physically present at the port through which the cargo would have been shipped but for the Act, or instead, can be located anywhere in the U.S. even if such location requires the government to transport the cargo to the vessel?

2) Whether, in upholding the government's regulation providing that availability is to be determined on a nationwide basis and that the Act requires that cargoes be transported to U.S.-flag vessels that can be found anywhere in the United States, the Seventh Circuit improperly applied the prior decisions of this Court in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), and *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), regarding the proper role of the executive branch in construing federal statutes.

3) Whether the government's relevant Title II, P.L. 480 regulations violate § 901(b)(1) and are arbitrary and capricious because they do not limit the grant of preference to U.S.-flag vessels in accordance with Congress' intended meaning of the "availability clause"?

PARTIES

The Petitioners are City of Milwaukee, Wisconsin; City of Superior, Wisconsin; International Longshoremen's Association, Local 815, Milwaukee, Wisconsin; International Longshoremen's Association, Local 1315, Kenosha, Wisconsin; International Longshoremen's Association, Local 1014, Green Bay, Wisconsin; International Longshoremen's Association, Local 1366, Duluth, Minnesota; International Longshoremen's Association, Local 1037, Superior, Wisconsin; Seaway Port Authority of Duluth, Minnesota; Indiana Port Commission; Meehan Seaway Services, Ltd.; Leicht Transfer & Storage Co.; Westlake Harbor Terminal, Inc.; Western Great Lakes Maritime Association, Inc.; Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line GMGH; Protos Shipping, Inc.; and Ceres Terminals Incorporated.*

The government respondents are the Secretary of Agriculture and the Administrator and subordinate officials of the Department of Agriculture's Agricultural, Stablization and Conservation Service; the Secretary of Transportation and the Administrator of the Department of Transportation's Maritime Administration; and the Secretary of State and the Administrator of the Agency for International Development.

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*With regard to the Petitioners that are corporations, only Armada Great Lakes/East Africa Service, Ltd. has a parent corporation, which is Armada Lines, Inc.

PARTIES (Cont.)

The intervenors-respondents are the Transportation Institute; American President Lines, Ltd.; Lykes Bros. Steamship Co., Inc.; The Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO; and the Labor Management Maritime Committee, Inc.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, City of Milwaukee, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, dated June 8, 1989, is

included in the appendix at App. 1-16 (877 F.2d 540 (7th Cir. 1989)). The opinion of the district court is included in the appendix at App. 19-30 (688 F. Supp. 479 (E.D. Wis. 1988)).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on June 8, 1989, reversing the injunction of the United States District Court for the Eastern District of Wisconsin.

The jurisdiction of this Court to review the opinion and order of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves: 1) Section 901(b)(1) of the Cargo Preference Act of 1954 (46 U.S.C. §§ 1241(b)(1) and 1241(f); and 2) 7 CFR § 1496.5 (1985) and 7 CFR § 1496.5 (1988). The pertinent provisions of these statutes and regulations are set forth in the appendix at App. 51-55.

STATEMENT OF THE CASE

This case involves the interpretation of a federal statute and presents a question of first impression – the meaning of the phrase "to the extent U.S. flags are available" as used in section 901(b)(1) of the Cargo Preference Act of 1954 (the Act). 46 U.S.C. § 1241(b)(1). That Act

grants a limited preference (initially 50% of such cargoes, now 75%) to U.S.-flag vessels for the carriage of certain government impelled cargo relevant in this case. (App. 1)

Petitioners are municipal ports, labor unions, and private entities involved in the ocean transport of agricultural commodities from the Great Lakes. Many of such agricultural commodities are shipped out of Great Lakes ports under Title II of the Agricultural Trade and Development Assistance Act of 1954 and 7 U.S.C. § 1721-26. This Act is known as the Food for Peace Program or the P.L. 480 program.[1] Respondents are three federal agencies[2] and their respective officials responsible for shipping U.S. government purchased agricultural cargoes from the United States to foreign countries. The intervenor-respondents (hereinafter "Intervenors") are various U.S.-flag maritime interests, which do not provide ocean transport services from the ports of the Great Lakes.

Title II commodity shipments are essential for the continuation of general cargo export shipping on liner

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[1] Section 901(b) applied to approximately 13 million metric tons of cargo in calendar year 1987. Approximately 50% of the cargo was P.L. 480 cargo and approximately 15% of P.L. 480 cargo was Title II cargo. MARAD '88, Annual Report of the Maritime Administration for Fiscal Year 1988, Department of Transportation, April, 1988.

[2] The three departments involved are the Department of Agriculture, through the Commodity Credit Corporation and Agricultural Stabilization and Conservation Service, the Department of Transportation through the Maritime Administration, and the Department of State through the Agency for International Development.

ocean carriers serving the western Great Lakes. Title II cargoes constitute the "base" or "magnet" cargoes to attract regularly scheduled liner service to Great Lakes ports.[3] Because there is virtually no U.S.-flag vessel service to Great Lakes ports, Petitioners rely upon foreign flag vessels to continue this liner service. Foreign flag liner service is the export lifeline for many Great Lakes ports. Longshoremen, stevedores, port operators and other port-related businesses and their employees are dependent upon this export lifeline, based on Title II cargoes, for economic survival.

From 1954 to 1983, the Respondents were generally able to place 50 per cent of Title II cargo on U.S.-flag vessels. During that period, the size of the U.S.-flag fleet declined substantially and the remaining U.S.-flag operators made a strategic decision to discontinue service to the Great Lakes and to concentrate port calls on a limited number of ports on the Atlantic, Gulf and Pacific coastal ranges using larger vessels that could not physically enter into the gateway to the Great Lakes, the St. Lawrence Seaway.

During much of that period and until 1987, the administration of the P.L. 480 Program included regulations which incorporated a bidding formula commonly referred to as "lowest landed cost." 7 CFR § 1496.5 (1985). (App. 55). Under this formula, the government sought the lowest total cost for the purchase of P.L. 480 commodities, the transport of those commodities to the port of

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[3] "Liner" service is regularly scheduled service between specific ports for predominantly packaged cargoes in segregable parcels. General cargo exports are distinguishable from bulk exports and from conventional exports (steel, automobiles).

export, and then ocean transport to the foreign port of destination.

Beginning in late 1983 and continuing during the later months of 1984 and 1985, the Department of Agriculture, in contravention of the regulation then in effect, diverted Title II cargo, which had been awarded under its regulations to Great Lakes ports on a commercial basis using foreign flag transportation, to ports on the other three coastal ranges for transport on U.S.-flag vessels solely to meet what the agency perceived to be its cargo preference obligation. (App. 5). In September, 1985, Petitioners filed this action seeking, *inter alia*, a declaratory judgment of the meaning of the "availability clause" and an injunction halting the government's cargo diversions.

Adjudication on the merits of Petitioners' claims was delayed three years as the District Court's decision dismissing the action for lack of standing, *City of Milwaukee v. Block*, 634 F. Supp. 760 (E.D. Wis. 1986), was appealed and reversed, *City of Milwaukee v. Block*, 823 F.2d 1158 (7th Cir. 1987). For ease of reference, this decision has been included in the appendix at App. 31-51.

During the pendency of this litigation in the District Court, Congress, in December of 1985, enacted the Food Security Act of 1985, P.L. 99-198, 99 Stat. 1491 (1985), which, among other things, raised the cargo preference, with respect to Title II commodities incrementally over a three-year period from 50 per cent to 75 per cent. 46 U.S.C. § 1241f.(a)(2). (App. 52).

Because of the adverse impact on Great Lakes ports, the 1985 amendments to the Act contained two additional provisions benefiting the Great Lakes. First, under a "set-aside" provision in effect during the calendar years 1986

through 1989, the government was to "take such steps as may be necessary and practicable without detriment to any port range" to preserve the percentage share or metric tonnage, whichever is lower, of Title II commodities which were exported from Great Lakes ports during 1984. 46 U.S.C § 1241f.(c)(2)(B). (App. 53).

Second, in response to complaints by the Great Lakes ports concerning year-end diversions of cargo that had taken place in 1983, 1984 and 1985, Congress changed the calendar year used to report compliance with the Act to 12-month periods commencing April 1, 1986. 46 U.S.C. § 1241f.(c)(2)(A). (App. 52-53). Such amendments did not alter the "availability" clause of § 901(b)(1). 131 Cong. Rec. S18323 (Daily Ed., Dec. 20, 1985).

On February 25, 1987, the Department of Agriculture amended its P.L. 480 regulations. 52 Fed. Reg. 5726 (1987). Those new regulations created a two-step bidding procedure in which 75 per cent of P.L. 480 cargo is automatically reserved for U.S.-flags. 7 CFR § 1496.5(a) (1988) (App. 55). The regulations did not address the definition of "availability." 52 Fed. Reg. 5729 (Feb. 25, 1987). However, the rationale employed by the U.S.D.A. was that U.S.-flags are deemed available wherever they can be found nationwide, and that the Act compels agencies to ship an absolute 75 per cent of the program's total annual tonnage on U.S.-flag vessels.

On September 15, 1988, the district court enjoined the government from implementing the Title II commodities program in a manner contrary to the Act. The court held that the government's application of the "availability" clause on a nationwide basis was contrary to the plain meaning of the Act which required that availability

be determined by geographic area, not nationwide. (App. 28). The court rejected Petitioner's contention that the Act required that all cargo for which U.S.-flags are unavailable be "subtracted out" in determining the total amount of cargo to which the Act's limited preference applies. (App. 23-24).

The Respondents and the Intervenors appealed claiming that the new regulations were an appropriate exercise of discretion in the administration of the Act. The Petitioners cross-appealed seeking to have the injunction modified to provide that the proper basis for determining U.S.-flag availability was the commercially selected port of lifting rather than the port range through which the cargo passed, and that cargoes for which U.S.-flags were not available should not be included in determining the total amount of cargo to which the Act's preference applies.[4]

On June 8, 1989, the United States Court of Appeals for the Seventh Circuit lifted the injunction issued by the district court. The court of appeals recognized that, to the extent U.S.-flags were unavailable, all cargo may move on foreign bottoms and that all parties to the action agreed with this position. (App. 9). In the court's words "vessel's availability varies by port." (App. 9). The court of appeals found that neither § 901(b)(1) nor the Act's legislative history speak to the issue of what "availability" means, notwithstanding pre-enactment, contemporaneous, and

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[4] Since an order recognizing Petitioners' "subtracting out" theory would necessarily be broader than the order issued by the district court, a cross-appeal was required. *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976).

post-enactment legislative history presented by Petitioners on the issue, as well as the fact the interpretation given the statute by the agency was not contemporaneous and was at odds with the agency's earlier interpretations. Instead, the court of appeals viewed the "structure of the statute" as a "more reliable" guide to construing the Act, relying upon the 1985 amendments rather than the original text of the Act which contains the "availability" clause and to which Congress made the 1985 amendments subject. The court of appeals held that the total cargo to which the Act's preference percentage applies is left to executive discretion. According to the court, a determination of the breadth of the statute's reach is nothing more than an administrator's choice of what is necessary to make the program work. (App. 11). Apparently in response to petitioners' claim that the regulations were arbitrary and capricious because (in addition to being contrary to law) they increased the cost of the Title II program at the expense of maximizing the purchase and delivery of domestically produced commodities, the court stated that the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, does not apply to "procurement" decisions of the federal government such as the one at issue. (App. 12).

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS THE ONLY JUDICIAL DECISION INTERPRETING THE MEANING OF THE "AVAILABILITY" CLAUSE OF § 901(b)(1), AND THE IMPACT OF THAT DECISION WILL BE FAR REACHING. ACCORDINGLY, THE SEVENTH CIRCUIT'S OPINION REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This case presents the Court with a matter of first impression. Since the enactment of § 901(b)(1) in 1954, no court has construed the meaning of § 901(b)(1)'s "availiability" clause other than the courts below. Beyond the uniqueness of the legal issue, however, the importance of the case is manifest for several additional reasons.

First, the statute involved generally applies to all non-military cargo generated by the federal government.[5] Consequently the legal precedent established in this case will be relevant to the application of § 901(b)(1) to the broad array of federal non-military cargo shipments. In 1987, § 901(b)(1) cargo preference applied to approximately 13 million metric tons of non-military cargo.

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[5] There is a different cargo preference statute applicable to federal military cargoes. 10 U.S.C. § 2631. The military statute is primarily different because it lacks the express "availability" provision contained in the statute involved here.

Second, an adverse ruling to the Petitioners on the meaning of "availability" cripples the ability of an entire U.S. coastal range – namely the Great Lakes – to compete for the ocean carriage of non-military government cargo. As such, the "magnet" or "base" cargo which attracts liner ocean service to the Great Lakes is eliminated. In short, under the interpretation of "availability" upheld by the Seventh Circuit, the Petitioners cease to be viable competitors in not only the trade to which the Act is applicable, but will lose ocean liner service for other non-governmental, commercial cargoes made possible by the attraction of the government cargoes. The impact on the Great Lakes' economy and commercial competitiveness relative to other regions of the nation is dramatic.

Third, the economic calamity facing the Great Lakes is replicable in other U.S. coastal ranges as the historic trend toward reduction in the size of the U.S.-flag fleet continues. As fewer non-Great Lakes ports are favored with U.S.-flag service, those ports too will find themselves unable to compete for government cargo, notwithstanding proximity to the source of the cargoes, or other inherent economic advantages. Thus, a proper interpretation of the "availiability" clause has "real life" significance for the entire nation. At a time when the country faces massive international trade imbalances, increasing exports of American products is critically important. The practical effect of the decision of the Seventh Circuit is that the U.S. ports which lack U.S.-flag service will become noncompetitors, thus increasing the cost of both governmental and commercial U.S. exports which will be forced to the select ports favored by U.S.-flag vessels.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

In *Chevron U.S.A. v. National Res. Def. Council*, 467 U.S. 837 (1984), this Court commented:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Id., at 843, n.9 (citations omitted). In *Chevron*, the court of appeals found that Congress did not have an intent regarding the precise issue in that case. This Court held that in such circumstances the court of appeals erred in not deferring to the agency interpretation.

In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), this Court explained that in some instances determining Congressional intent is a pure question of statutory construction for the courts to decide. In such instances, once Congress' meaning is determined, no deference is accorded executive branch determinations to the contrary. In *Cardoza-Fonseca*, this Court distinguished between the issue of whether two standards used in the immigration laws were intended to be identical, and the issue that arises when the agency is required to apply either or both standards to a particular set of facts. The first issue is a pure question of statutory construction, a matter particularly in the province of the judiciary. The second is an issue to which deference to agency discretion may be required. *Cardoza-Fonseca, supra* at 1220, 1221.

The question presented by this case is whether Congress intended the preference granted by the Act to be applicable only where U.S.-flags are available to transport cargo from a port through which such cargo would have been shipped but for the Act, or whether Congress intended the Act to require government agencies to make cargo available to ports served by the U.S. vessels. In short, the question is the reach of the statute.

The court of appeals misapplied the holdings in both *Chevron* (which it did cite) and *Cardoza-Fonseca* (which it did not cite) when it held that, while the reading given the Act by Petitioners was one way to read the statute, it was not the only way, and deferred to the discretion of the administrators in determining nothing less than the reach of the statute. (App. 9). This is not a case like *Chevron* where it was clear that Congress had no intention with respect to the issue in question. This is a case involving the role of the Executive Branch in construing a statute with respect to which Congress clearly had an intention: an area of the law "hotly disputed" in the words of the court of appeals. (App. 9). All parties agree that the Act applies only "to the extent U.S. flags are available . . . " The determination of what Congress intended by the use of the phrase is a question for the Courts and cannot be left to executive discretion.

The term "available" must mean something. Extensive pre-enactment, contemporaneous, and post-enactment legislative history of the Act indicates that Congress intended and indeed understood that the preference would be applicable only "to the extent U.S. vessels were available" at the port through which such cargo would have been shipped but for the Act. The court of appeals, however, reaches a decision that allows the limitation of availability to be totally ignored by the executive branch,

a result which makes its inclusion in that statute in the first instance meaningless. While the Act may be special interest legislation it is *limited* special interest legislation, and the extent of the limitation intended by Congress is every bit as important as the special preference granted. By totally ignoring the limitation, the court of appeals has allowed the government through administrative interpretation to rewrite the statute, a result at odds with this Court's decisions in *Chevron* and *Cardoza-Fonseca*.

The lower court and all parties agree that it is necessary to determine what Congress intended by inserting the "availability" clause in the Act. *Chevron* teaches that one of the tools of statutory construction used to ascertain the intent of Congress is legislative history. 467 U.S. at 844.

The lower court rejected all legislative history of the intent of Congress as to the meaning of the "availability clause" of the Act and accepted the government's decision to administer the Act on a nationwide basis.

That decision conflicts with the teaching of this Court in *Chevron*, 467 U.S. 837, which requires courts to first analyze legislative history to determine the intent of Congress before deferring to administrative construction of statutory language, especially where that construction may be contrary to Congressional intent.

Surprisingly, the decision also ignores the first decision of the court of appeals in this case concerning standing which concludes, after analysis of the identical legislative history, that "the legislative history also indicates that, in enacting the Cargo Preference Act, Congress shared the plaintiffs' concern about the effect of this legislation in situations in which no United States-flag

ships are available." (Citations omitted). (App. 48). 823 F.2d at 1167.

The legislative history, which the court of appeals rejected with minimal comment, clearly reflects the intent of Congress as to the meaning of the "availability" language in the Act. The policy determinations of Congress with respect to the parameters of the preference granted in the Act can be gleaned from the history of predecessor statutes, from contemporaneous legislative history, and from post-enactment history. Because of the importance of the legislative history presented by Petitioners not only to the merits of this action, but also to the issue of whether this Petition should be granted, a brief summary of some of that history is presented here.

A. Prior Legislation.

Legislative history includes the history and language of predecessor statutes on the same subject. Prior statutes on the same subject are a valuable guide for determining what object an act is supposed to achieve. *Todd v. Norman*, 840 F.2d 608, 611 (8th Cir. 1988). 2A C. Sands, *Sutherland Statutory Construction* § 48.03 (4th ed. 1984). Legislative history of the meaning of availability can be found in cargo preference legislation enacted prior to the 1954 Act.

The Economic Cooperation Act of 1948, enacted as Title I of the Foreign Assistance Act of 1948, P.L. No. 80-472, 62 Stat. 137, contained the following language in sec. 111(a)(2) with respect to the procurement of commodities sent abroad:

> The Administrator shall, in providing for the procurement of commodities under authority of this title, take such steps as may be necessary to assure, so far as is practicable, that at least 50

> per centum of the gross tonnage of commodities, procured within the United States out of funds made available under this title and transported abroad on ocean vessels, is so transported on United States-flag vessels *to the extent such vessels are available at market rates.* (Emphasis added).

While the legislative history of this particular provision is sparse, the meaning attributed to the phrase "to the extent such vessels are available . . . " is clarified by the legislative history of the Economic Cooperation Act Amendments of 1949 ("ECA"), P.L. No. 81-47, § 6, 63 Stat. 50, 51 (1949), which amended the 1948 ECA provision.

During the Senate debate on the 1949 ECA amendments, Senator Connally, Chairman of the Senate Foreign Relations Committee, explained that 47-percent participation gained by United States-flag vessels in the past, a fact which had caused much distress with U.S.-flag advocates, did not mean that the law had been violated:

> *The law did not absolutely require the shipment of 50-percent in American vessels. It provided that if they were available,* and if it were practicable under the circumstances, the goods should be shipped in them. . . . They are not going to sit down and wait for someone to build a ship or bring one from South America. It *must be available,* changing market rates.[6] (Emphasis added).

Thus, in the very first debates over the cargo preference provision that is the direct predecessor to the cargo preference statute involved in this litigation, Congress addressed the key question whether the preference applied when U.S.-flag vessels were not available.

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[6] 95 Cong. Rec. 3184 (1949) (statement of Sen. Connally) (emphasis added).

The will of the Congress was to provide cargo preference in a flexible scheme that "assured" U.S.-flags a preference only where they were available.

B. Legislative History of the Act.

By the beginning of 1954, the status of the U.S. merchant fleet was still deteriorating. Accordingly, Senator Butler of Maryland on March 31, 1954 introduced S. 3233, since in his words: "[t]he time has come when 50-50 should be permanently enacted so as to apply generally to all foreign-aid type programs."[7] As introduced, the bill contained a provision which required that: "commodities shall be transported exclusively on privately owned United States-flag commercial vessels."[8] However, when the bill became law, the above-quoted supplemental provision (providing for "exclusive" U.S.-flag service) had been dropped and the historic cargo preference provision assuring preference only to the extent U.S. vessels were available continued unchanged.

During House consideration of S. 3233, the most illuminating discussion in the history of cargo preference concerning the actual meaning of the term "available" took place in hearings before the House Committee on Merchant Marine and Fisheries. Testifying for U.S.-flag shipping interests was Francis T. Greene, Executive Vice President, American Merchant Marine Institute, who indicated that he spoke for substantially the entire U.S.-flag merchant marine.

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[7] 100 Cong. Rec. 4159 (1954) (statement of Sen. Butler).

[8] 100 Cong. Rec. 4159 (1954) (statement of Sen. Butler).

In his prepared statement, Mr. Greene stated that the "flexible" 50-50 requirement *is applicable* only to the extent U.S.-flag vessels are available: "The second flexibility provision is likewise drawn from the earlier statutes, in that the 50-50 requirement is applicable *only to the extent that private American-flag vessels are 'available* at fair and reasonable rates for United States-flag commercial vessels.' "[9]

In the course of the hearing, Mr. Greene and the committee members established their common understanding of the availability provision. A particularly telling exchange occurred among Congressmen Allen and Bonner, both active participants in cargo preference legislative proceedings, and Mr. Greene. This exchange is set forth in the appendix at App. 57-58.[10]

This contemporaneous legislative history of the Act demonstrates Congress' understanding that: (i) the cargo preference created for U.S.-flag vessels be conditioned upon the physical availability of those vessels at the port of export (i.e. "at the place where the cargo was to be

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[9] *Waterborne Cargoes in United States-Flag Vessels: Hearings on S. 3233 Before the Comm. on Merchant Marine and Fisheries of the House*, 83d Cong., 2d Sess. 97 (1954).

[10] This colloquy between representatives Allen and Bonner and Mr. Greene of the Merchant Marine Institute was rejected out of hand by the court of appeals. 877 F.2d at 544 (App. 10) However this Court has noted that if an Act is essentially an agreement between interested parties, statements made at hearings by witnesses are entitled to great weight. *S & E Contractors v. United States*, 406 U.S. 1, 13 (1972); *see also, Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 576 (1971).

lifted"; "the ship would have to be in that geographic area"); (ii) the preference would be applied with respect to the specific, discrete cargoes, not overall to the program's annual tonnage of cargoes; (iii) the federal agencies were to make cargo shipment decisions, including selection of the port of export, in accordance with normal commercial considerations (i.e. "available in relation to the requirements for the cargo movement"; "and in relation to the [place and] time that the cargo is scheduled to be lifted"); and (iv) a U.S.-flag vessel's physical availability at the selected port was a completely separate requirement from the reasonableness of the U.S.-flag rates that the agencies might have to pay for a physically available vessel ("there is the additional flexibility of a fair and reasonable rate").

C. Post-CPA Enactment Legislative History.

This Court has recognized that the view of a later Congress may have persuasive value. *Bell v. New Jersey*, 461 U.S. 773, 784-85 (1983). In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980), this Court stated that while views of a subsequent Congress cannot override the unmistakable intent of the enacters, such views are entitled to significant weight, particularly where the precise intent is obscure.

There is extensive post-enactment legislative history of the availability clause of the Act which is consistent with both contemporaneous and pre-enactment legislative history.

Late in 1955, concerns were expressed that the 1954 Act was "impeding programs for the export of surplus

agricultural products." In 1956 both the House and the Senate held oversight hearings to evaluate experience under the Act. Specifically those hearings addressed the meaning of "availability." See, *Operation and Administration of the Cargo Preference Act: Hearings on P.L. 664 Before the House Comm. on Merchant Marine and Fisheries,* 84th Cong., 2d Sess. (1956) ("House Hearings"); *Amendment to Cargo Preference Statutes: Hearings on S. 2584 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. (1956) ("Senate Hearings").

In particular, Petitioners draw the Court's attention to the testimony of Mr. A.E. Thorpe, Executive Vice President of the Dried Fruit Association of California, who testified before the House Committee on February 3, 1956. Mr. Thorpe's Association was actively involved in shipping commodities overseas under Title II and was ostensibly advocating a resolution put forth by the National Council of Farm Cooperatives which favored amending or modifying "the so-called 50/50 cargo preference clause as to not impede exports of United States agricultural products." Mr. Thorpe was concerned that future concessional sales under P.L. 480 would not be forthcoming because the Act applied to such sales.

After hearing Mr. Thorpe's prepared remarks, members of the Committee, Representatives Miller, Robeson, and Allen, first established that the operation of the preference in the Act had nothing to do with the inability of Mr. Thorpe's farmers to sell overseas since it had been established that no U.S.-flag vessels served the west coast to the relevant destinations and therefore the preference did not apply. This colloquy between the members of the

Committee and Mr. Thorpe is set forth in the Appendix at App. 59-60.

The Senate Subcommittee hearings also focused on the alleged adverse impact the Act had on programs to facilitate the sale of surplus agricultural products abroad. Those who supported exemption of these programs from cargo preference requirements alleged that they were losing foreign sales from the West Coast because of cargo preference.

At the Senate hearings, Mr. August J. Bourbon, a staff member of the Senate Subcommittee on Merchant Marine and Fisheries, posed the following question to Mr. Alexander Purdon, Executive Director, Committee on American Steamship Lines:

> Mr. Bourbon: Where do you think Agriculture runs into its difficulties? Is it particularly with regard to making application of 50/50 with regard to *geographical areas?*
>
> Mr. Purdon: I think that has been a major difficulty. I think Senator Butler pointed out earlier that that is not truly a difficulty, it is merely a manufactured objection. *If there is no American-flag service of the type that is required for the transport of apples from the area where they are required to be transported from, the law just does not apply. If the law does not apply, 50/50 is not a factor.* But the foreign critics, it seems to me, have merely said, "We would buy your apples except for 50/50" when the truth of the matter is that 50/50 is not a factor in the consideration at all. So I do not think that it is a valid point at all. I think Senator O'Connor, in the last paragraph of his statement, pointed out quite adequately that this is

not something that the foreigners can make claim to.[11]

These examples of legislative history of the Act clearly reveal Congressional intent to place limitations on the preference granted in the Act. Congress did not intend to mandate a preference to U.S.-flag vessels under all circumstances. It was not the intent of Congress to force government agencies to move cargoes to ports of export selected by U.S.-flag vessel owners. Rather it was the intent of Congress that the preference would apply if U.S.-flag vessels were available at the ports from which cargo was to be exported.

III. IN HOLDING THAT THE "AVAILABILITY" CLAUSE MAY BE APPLIED ON A NATIONWIDE BASIS, THE COURT OF APPEALS HAS IMPROPERLY SUBSTITUTED THE JUDGMENT OF THE EXECUTIVE BRANCH FOR THE CLEAR INTENT OF CONGRESS.

A. Administrative Construction of the Act Has Been Neither Consistent nor Longstanding.

It has been a longstanding rule of this Court that a court's deference to administrative construction is only applicable in instances where an agency has rendered binding consistent official interpretations of its statute over a long period of time. *INS v. Cardoza-Fonseca, supra; Piper v. Chris-Craft Indus.*, 430 U.S. 1, 42 (1977); *United States v. National Assoc. of Sec. Dealers*, 422 U.S. 674, 719 (1975).

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[11] *Amendment to Cargo Preference Statutes: Hearings on S. 2584 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 139 (1956) (emphasis added).

The court of appeals deference to the government's construction of the "availability" clause was inappropriate because that construction has been neither consistent nor longstanding. Until 1983, the government netted the 50 percent preference under the Act operating under regulations which allocated cargo based upon "lowest landed cost." In the later months of 1983, 1984 and 1985, the government began to divert cargoes, contrary to its lowest landed cost regulations, in order to meet what it perceived as a mandatory preference. Because these diversions were contrary to its regulations, they were neither official interpretations of the Act nor were they based on a longstanding policy. It was not until February, 1987, during the pendency of this litigation that the government memorialized those diversions in its regulations. Those regulations established a two-tier bidding procedure whereby 75 percent of Title II commodities were allocated exclusively to those bidders who incorporated U.S.-flag shipping in their bids. These regulations precluded Great Lakes interests from competing for 75 percent of Title II commodities even though legislative history clearly demonstrated that it was congressional intent that the Act did not even apply under the circumstances faced by the Great Lakes, i.e., lack of U.S.-flag liner service.

B. The 1985 Amendments do not Support the Administrative Construction of the Act.

The court of appeals found support for the government's administration of the Act on a nationwide basis from the language of the Act's 1985 amendments. First,

the court found support in the annual reporting requirement of the Act, stating:

> [T]he year-long accounting period means that the statutory preference is *not* limited to vessels on hand. U.S.-flag ships are entitled to 75% of a *year's* worth of cargo (if available at reasonable prices). If the baseline extends beyond the ships in port each day, why can't it extend beyond the given port? The contemporary Congress believes that it does. (Emphasis in original)

Reliance upon the reporting requirements of the Act is misplaced. The Act does require the Secretary of Transportation to review administration by departments or agencies of the government having responsibility for the program subject to the Act, and it further requires that the Secretary of Transportation report annually to the Congress regarding his or her review. 46 U.S.C. § 1241(b)(2).

There is nothing in this reporting requirement, nor in its legislative history, to suggest that it was intended as a mandate to those responsible for administering the Act to ship at least 75% of a year's worth of cargo on U.S. vessels. The annual reporting requirement is just that and nothing more.

The court of appeals further suggested that the Great Lakes "set-aside" clause and the new accounting year contained in the 1985 amendments to the Act makes sense only if the government is entitled to use a nationwide baseline. This conclusion is erroneous.

As the court of appeals recognized when it first considered this litigation in 1987, Congress was specifically concerned with the effect of the Cargo Preference Act on

the Great Lakes when it enacted the 1985 amendments. The Congressional amendments were not in recognition of a policy of the executive branch to apply cargo preference nationwide. No such policy existed. Rather, the purpose of the "set-aside" clause and the change in the annual reporting period was simply to address the government's diversion of cargoes from the Great Lakes contrary to the then existing "lowest landed cost" regulations. 823 F.2d at 1167. (App. 48).

In fact, the court of appeals at that time recognized that when Congress adopted the 1985 amendments to the Act, it was fully aware of the pendency of this litigation and made clear that the amendments were not intended to disturb the litigation. *Id.* at 1167. (App. 48-49).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-3034, 88-3198, and 88-3213

CITY OF MILWAUKEE, *et al.*,

Plaintiffs-Appellees/Cross-Appellants,

v.

CLAYTON K. YEUTTER, SECRETARY OF AGRICULTURE, *et al.*,

Defendants-Appellants/Cross-Appellees.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 85-C-1509 – **Robert W. Warren,** *Chief Judge.*

ARGUED MARCH 30, 1989 – DECIDED JUNE 8, 1989

Before EASTERBROOK and RIPPLE, *Circuit Judges,* and HENLEY, *Senior Circuit Judge.**

EASTERBROOK, *Circuit Judge.* Several federal programs provide free or subsidized food for nations in need. American vessels get a preference in transporting the food:

> [T]he appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least [75] per centum of the gross tonnage . . . which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to

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* Hon. J. Smith Henley, of the Eighth Circuit, sitting by designation.

> the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas. . . .

46 U.S.C. App. §1241(b)(1), as modified by 46 U.S.C. App. §1241f(a)(l). Our case involves the application of this rule to food bought and shipped by the federal government under Title II of the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. §§ 1721-26, known popularly as the Food for Peace program and within the shipping business as the Title II or P.L. 480 program.

Much of the food suitable for this program is grown in or near the midwest and could be exported from ports on the Great Lakes. Modern U.S.-flag ships suitable for this trade can't squeeze through the Welland Canal, however, and therefore cannot operate above Lake Ontario. Foreign-flag vessels accordingly dominate ocean commerce at upper Great Lakes ports. The cities and labor unions who filed this suit want the government to export more commodities on foreign vessels through the upper Great Lakes. The district court originally dismissed the suit for want of standing, 634 F. Supp. 760 (E.D. Wis. 1986), but we directed it to decide the case on the merits, 823 F.2d 1158 (7th Cir. 1987).

Any rule using a percentage requires definition of the denominator. Seventy-five percent of which shipments, from which ports, over what period of time? The federal agencies responsible for buying and shipping food under the P.L. 480 program – the Agency for International

Development (AID) and the Commodity Credit Corporation (CCC), operating under regulations promulgated by the Maritime Administration (MarAd) of the Department of Transportation chose one year as the accounting period, without protest. They chose the entire nation as the geographic basis. Computing the percentage port-by-port, or by range of ports (Gulf Coast, East Coast, West Coast, and Great Lakes), could lead to substantial deviation from the 75% figure for the nation as a whole. Selecting the nation as the base means that Great Lakes ports cannot load more than 25% of the cargo, and as a practical matter they handle much less. The locks are frozen for four months; more, under a nationwide accounting system every shipment on a foreign-flag vessel from a coastal port reduces the maximum that can be exported via the Great Lakes.

The City of Milwaukee and the other 17 plaintiffs (collectively Milwaukee) asked the district court to direct the federal agencies to compute percentages by port. They maintain that if grain appears in Milwaukee for export, it may go on a foreign-flag vessel because no U.S.-flag vessel is available at any price, let alone a "reasonable" one. If grain appears in Baltimore, 75% of it must go on domestic vessels available at prices reasonable "for United States-flag commercial vessels". That the share of U.S.-flag vessels in total exports under Milwaukee's approach would be less than 75% is, as Milwaukee sees things, simply a consequence of the requirement that U.S.-flag vessels be available at reasonable prices where the cargo is. If U.S.-flag carriers want to carry midwestern grain, they have only to come and get it.

But of course grain doesn't just appear at dockside. Somebody sends it there. "Somebody" turns out to be the Kansas City Commodity Office (KCCO) of the Department of Agriculture's Agricultural Stabilization and Conservation Service, which when informed by AID of the need (and appropriations) buys the food, gets it to a port, and pays for ocean transportation. Until 1987 the KCCO decided what to buy and which port to use by a formula called "lowest landed cost". 7 C.R.F. §1496.5 (1985). If AID wanted to give 100 tons of corn to Pakistan, KCCO would take bids on a package of corn, inland transportation, and ocean transportation. Grain merchants such as Cargill would find the combination that produced the lowest cost as delivered ("landed") in the port of destination. On a given shipment this might mean buying the corn in Illinois, shipping it by rail to Milwaukee, and using a foreign vessel out the Great Lakes, through the Panama Canal, thence to Pakistan. Or it could mean buying corn farther west, rail to the West Coast, and U.S.-flag vessels to Pakistan.

This method would have minimized costs if there were no cargo preference. But if the bid assumed shipment on foreign vessels from a coastal port, U.S.-flag vessels might be available there at the same time. Transferring the shipment to satisfy the preference could increase the cost over what it would have been had the food been purchased elsewhere and shipped through a different port. Consistent application of the lowest landed cost method also could send so much food to ports with few U.S.-flag vessels that the agencies could not meet the domestic preference – at least not if the preference were administered nationally.

In August and September 1985 the KCCO diverted cargo from the Great Lakes (to which it had been assigned under the lowest landed cost formula) to coastal ports to satisfy the U.S.-flag quota. The Food for Peace program directed extra supplies to Africa to cope with a famine in 1985, and because few U.S.-flag vessels serve that continent most of the traffic went on foreign bottoms. Thus the need for extra U.S.-flag shipments. These diversions precipitated this suit.

Before the district court could render a decision, both Congress and the federal agencies changed the rules. In December 1985 Congress enacted 46 U.S.C. App. §1241f which, among other things, raised the domestic preference from 50% to 75%. Because the increase would affect Great Lakes ports adversely, Congress gave them a grandfather clause:

> [T]he Secretary of Transportation, in administering this subsection and section 1241(b) of this title . . . shall take such steps as may be necessary and practicable without detriment to any port range to preserve during calendar years 1986, 1987, 1988, and 1989 the percentage share, or metric tonnage of bagged, processed, or fortified commodities, whichever is lower, experienced in calendar year 1984 as determined by the Secretary of Agriculture, of waterborne cargoes exported from Great Lake ports pursuant to title II of the Agricultural Trade Development and Assistance Act of 1954.

46 U.S.C. App. §1241f(c)(2)(B). It added for good measure a change in the accounting year. Early in the year is the "best" time for shipments on foreign vessels, because the KCCO does not feel pressure to "make the quota"; in the fall, however, the KCCO may divert shipments so that

things come out right. Great Lakes ports are closed at the beginning of the calendar year and open when the KCCO may be diverting traffic. Thus the impetus for a different accounting year: Instead of being coterminous with the calendar year, the accounting year now starts on April 1, when Great Lakes ports open for business. 46 U.S.C. App. §1241f(c)(2)(A).

In February 1987 MarAd changed the rules under which KCCO evaluates bids. 52 Fed. Reg. 5726, 5729 (1987), 7 C.F.R. §1496.5 (1988). These regulations require KCCO first to "calculate the lowest landed cost using only higher-priced United States-flag ship rates for the portion of its commodities that it believes is necessary to meet its obligations under the act on a nationwide basis", 823 F.2d at 1162, and then allow full competition between U.S. and foreign-flag vessels for the rest. In other words, the regulations segment the market. KCCO requires its bidders to use only U.S.-flag rates when making bids for 75% of the exports, and it allows bids based on lowest available cost for the remaining 25%. It gave this rationale for the new system:

> In most cases, [the prior method] resulted in commodities being procured and allocated to ports (or port ranges) on the basis of foreign flag vessel rates since these rates are often lower than U.S. flag rates. Foreign flag and U.S. flag vessels are then contracted to carry portions or all of the cargoes allocated to these ports (or port ranges). Generally, cargo preference requirements have been met by contracting with U.S. flag vessels calling at these ports. On occasion this practice results in higher expenditures for U.S. flag carriage than is necessary to comply with cargo preference because commodities

> allocated on an LLC basis may not have been allocated to ports serviced by U.S. flag vessels with the least costly U.S. flag rates. The requirement for increased cargo preference will exacerbate the problem.

52 Fed. Reg. 5726 (1987). Milwaukee took up cudgels against this regulation, the source of its current woes. It contends that the KCCO must allocate shipments on the basis of "true" lowest landed cost rather than on the basis of least cost given the segmentation. According to Milwaukee, this would not prevent implementation of the 75% preference, because cargoes allocated to the Great Lakes can be carved out of the denominator. Milwaukee also submits that administering the preference on a national basis violates the Port Preference Clause of the Constitution, Art. I §9 cl. 6, because it draws cargo away from the Great Lakes.

The district court enjoined implementation of the revised 7 C.F.R. §1496.5 688 F. Supp. 479 (E.D. Wis. 1988). The court did not reach Milwaukee's arguments that only a pure lowest landed cost method complies with the Act and that the preference must be applied port-by-port; it rejected Milwaukee's contention that the regulation violates the Port Preference Clause. 688 F. Supp. at 488. It held instead that the "plain language" of §1241(b)(1) forbids use of a nationwide base. 688 F. Supp. at 486-87. Under the statute the government must allocate cargoes "in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes *by geographic areas*" (emphasis added), which the court thought means *by port ranges*. Federal officials – joined by the Transportation Institute, two U.S.-flag lines, and two unions of coastal dock workers, which

had intervened to oppose Milwaukee's demands – filed an appeal. Milwaukee has filed a pointless cross-appeal, supporting the judgment but asking us to substitute its rationales for the district court's, which it does not defend. (Reminders, e.g., *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987), that prevailing parties need not file cross-appeals to make arguments in defense of their judgments seem to fall on deaf ears.)

The command to allocate cargoes "in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas" speaks of "a fair and reasonable *participation of United States-flag commercial vessels* in such cargoes", not of a fair and reasonable participation of ports or port ranges. Section 1241(b)(1) is special-interest legislation, but the interest is that of U.S.-flag lines, not of ports. "By geographic areas" means "by destination", not "by origin". This ensures that the government can't short-haul domestic carriers. It can't send shipments from Bangor, Maine, to Providence, Newfoundland, on U.S. ships while reserving all the traffic from Philadelphia to Bangkok for foreign bottoms.

If the statute were not clear as is, the legislative history fills all need. The language in question comes from other cargo-preference laws in which it is unmistakably a reference to destinations rather than origins, e.g., §409 of the Mutual Defense Assistance Act of 1949, 63 Stat. 714, 720 (1949). Administrative interpretations of this language before it appeared in §1241(b)(1) in 1954 uniformly treated it as a reference to destinations. E.g., Department of Defense Directive No. 2110.12 (Nov. 14, 1951) ("The term 'geographic areas' is considered to be

descriptive of destination areas and not related to origin areas."). Interpretations along these lines were presented to Congress before it enacted §1241(b)(1). By choosing tried-and-true language, Congress also chose a tried-and-true interpretation. Ever since, the responsible agencies have interpreted this language as referring to destinations. They could hardly have done otherwise, and the district court erred in holding that this language forbids a nationwide base.

Milwaukee defends its victory on the ground that cargo arriving at ports not frequented by U.S.-flag carriers must be carved out of the total to which the 75% preference applies. It reasons that the statute speaks of a domestic preference only when U.S.-flag carriers are available. If U.S.-flag carriers are unavailable – or if they want too much money – then *all* cargo may move on foreign bottoms. All parties accept these propositions. Vessels' availability varies by port. Hence, Milwaukee submits, the ratio must be computed port by port. If each port delivers 75% of its cargo to U.S. bottoms available there, the statutory requirement has been satisfied. It is possible to read §1241(b)(1) this way, but it is not inevitable. As we have pointed out, someone has to choose a denominator in order to produce a fraction. In the ordinary course, the agencies charged with making the program work may make choices of this sort unless the statute and its history show that Congress has made the choices itself. *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411-12 (7th Cir. 1987). The role of the Executive Branch in construing laws is hotly disputed; the role of the Executive Branch in filling the interstices left by statutes that commit a subject to executive discretion is

beyond question. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Section 1241(b)(1) does not speak to the question, and neither does the legislative history. The parties pepper their briefs with statements made to Congress in hearings; Milwaukee is especially fond of an exchange between Rep. Allen and Francis T. Greene, testifying on behalf of the Merchant Marine Institute, that occurred during hearings before the House Committee on Merchant Marine and Fisheries. The government replies with legislative history of its own. We are leery of inferences based on exchanges during hearings. Unless repeated in the committee reports (none was), such statements go unnoticed by Congress and cannot inform, or help us to understand, anyone's vote. Even statements on the floor – unreliable because no one may have been there when the words were delivered – are more useful than colloquies in hearings. Cf. *Covalt v. Carey Canada Inc.*, 860 F.2d 1434 (7th Cir. 1988). Statutory structure is much more reliable as a guide to meaning, and the structure of these statutes supports the agencies' position.

Milwaukee uses the "availability" requirement of §1241(b)(1) as the jumping-off place for its argument: it means, Milwaukee believes, that the preference applies only when U.S.-flag vessels happen to be available in port when the cargo arrives. Yet the year-long accounting period means that the statutory preference is *not* limited to vessels on hand. U.S.-flag ships are entitled to 75% of a *year's* worth of cargo (if available at reasonable prices). If the baseline extends beyond the ships in port each day, why can't it extend beyond the given port? The contemporary Congress believes that it does. The Great Lakes

grandfather clause and the new accounting year in §1241f make sense only if KCCO is entitled to use a nationwide baseline; if, as Milwaukee submits, the government must proceed port-by-port, it is quite unnecessary to protect the Great Lakes from diversions. The "by geographic areas" clause also suggests the need for a baseline larger than one port. If KCCO is to even out shipments by destination, it has to be able to bring more than one port at a time into the computation.

Although the structure of §1241(b)(1) and §1241f supports the government's position, we need not decide whether it *compels* the government to use a national baseline. Milwaukee's injury does not flow directly from the choice of a national baseline. It comes from the revised "lowest landed cost" regulations, which allocate to U.S.-flag vessels 75% of the cargo (and minimize the cost to the government, given the decision to do so). Nothing in §1241(b)(1) or §1241f says that the government is forbidden to provide U.S.-flag carriers with *more* than the amount of the preference. Indeed, nothing in these statutes says how the KCCO shall decide where to buy the commodities, which port to move them to, and how to export them. If the KCCO were to decide to use U.S.-flag vessels for 100% of all exports, this could not be said to *violate* §1241(b)(1) or §1241f – or for that matter any other statute of which we are aware. Such a decision would raise the total costs to the government (more likely, reduce the amount of food delivered, given the appropriation for foreign aid), but not at the expense of any entitlements protected by these statutes.

Higher costs associated with using "too many" domestic vessels might be said to be arbitrary and capricious, presenting questions under the Administrative Procedure Act. Yet the APA has never been thought to cover ordinary procurement decisions of federal agencies – whether to use thick Acme rubber bands rather than thin (and cheap) Zippy rubber bands, for example. Agencies as purchasers of goods and services may make the same sorts of judgments private purchasers might, unless a statute covers the subject. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12 (1980); *Peoples Gas Co. v. Postal Service*, 658 F.2d 1182, 1200-01 (7th Cir. 1981). Some procurement decisions have been governed by special statutes, such as the Service Contract Act, 41 U.S.C. §§ 351-58, or laws requiring the government to use the low bidder. Some have not. If the Army wants gold-plated can openers, and this increases the costs of procurement, this does not violate the rights of a bidder who would like to sell can openers made out of brass. Milwaukee is not the victim of regulation; it is only a disappointed bidder. It believes that it can "sell" the government a port service that is efficient because (a) close to the source of the food, and (b) served by vessels offering low rates. Milwaukee suffers because the government does not want to buy as much of this service as Milwaukee believes would be optimal. Even if no statute compels the government to use a national baseline, no statute protects Milwaukee from this sort of purchasing decision, either.

Perhaps no statute, Milwaukee rejoins, but the Port Preference Clause does. It says:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Undoubtedly the statutes and the KCCO's practices mean that less traffic goes through Milwaukee than would do so if the government selected ports on a low-bid basis. Yet failing to use the lowest *price* is not the same thing as discriminating among *ports*. The "preference" in the statutes is for U.S.-flag vessels. If domestic vessels called at Milwaukee, the KCCO would be only too happy to use its port. Milwaukee suffers from the disparate effects of statutes and regulations written in a neutral fashion. (Not quite: §1241f(c)(2)(B), the grandfather clause, expressly uses geography to allocate business to the Great Lakes. Not surprisingly, Milwaukee does not say that this rule violates the Port Preference Clause, and we need not decide whether it does.) Preferences for domestic shipping are not the only federal rules that leave coastal ranges better off. The Navy builds, berths, and repairs its ships on the coasts – at Pascagoula, Mississippi, at Newport News, Virginia, on Long Island, and so on – for much the same reason Milwaukee suffers from §1241(b)(1): large ships cannot get through the locks to the upper Great Lakes, and even if they could, it would be inconvenient to bring ships far inland.

Disparate consequences of neutral rules do not violate the Port Preference Clause. An unbroken line rejects contentions similar to those pressed on us. E.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433-36 (1856) (a bridge that interdicts access to an upriver port does not violate the Clause, remarking at 435

that the Clause "seems to import a prohibition against some positive legislation by congress [preferring certain ports], and not against any incidental advantages that might possibly result from the legislation of congress upon other subjects"); *South Carolina v. Georgia*, 93 U.S. 4, 12-13 (1876) (similar); *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908) (rules changing rail rates and diverting traffic from some ports do not violate the Clause); *Louisiana Public Service Comm'n v. Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931) (a rail rate allowance for crossing the Mississippi in Louisiana does not violate the Clause: "Congress . . . causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports"); *Alabama Great Southern R.R. v. United States*, 340 U.S. 216, 229 (1951). See also *City of Houston v. FAA*, 679 F.2d 1184, 1196-98 (5th Cir. 1982) (summarizing these cases).

Nothing in the background of the Port Preference Clause suggests that the Supreme Court has missed a turn. Maryland's delegation to the Constitutional Convention demanded the inclusion of this clause in order to avert the possibility that Congress might require vessels to stop and clear customs at Norfolk, Virginia, before entering Chesapeake Bay, to the detriment of Baltimore. Max Farrand, 2 *Records of the Federal Convention* 417 (Madison: August 25, 1787). Maryland got what it wanted – not only the explicit ban on an obligation to clear customs at the coastal ports but also the more general prohibition of preferences. Yet Luther Martin, the force behind the Clause, was not satisfied and went into opposition after the Convention. Martin complained that the Clause dealt only with express preferences and left states to bear the

effects of other rules. He expressed greatest concern about Congress' power to designate some places as customs ports to the exclusion of others:

> [A]s the system is now reported, the general government have a *power* to *establish what ports they please in each State*, and to ascertain at what ports in every State ships shall clear and enter in such State, a power which *may* be so used as to *destroy* the *effect* of that provision, since by it may be established a port in such a place, as shall be so *inconvenient* to the State, as to render it *more eligible* for their shipping to clear and enter in *another* than in their *own State;* suppose, for instance, the general government should determine that all ships which cleared or entered in Maryland, should clear and enter at George-Town, on Potowmack [this was before Maryland ceded the swampland at Georgetown to the United States for the national capital!], it would oblige all the ships which sailed from, or were bound to, any other port of Maryland, to clear or enter in some port in *Virginia*.

Luther Martin, *Genuine Information* (1788) (emphasis in original), reprinted in Philip B. Kurland & Ralph Lerner, 3 *The Founders' Constitution* 372 (1987). Hyperbole from opponents must be used with care, but Martin, as the proponent of the Port Preference Clause, was in the ideal position to know what he had and hadn't obtained from his colleagues at the Convention. He got a ban on express discrimination; he wanted, and couldn't get, a ban on disparate impact. For two hundred years courts have understood that only explicit discrimination violates the Port Preference Clause, and this dooms Milwaukee's argument.

Milwaukee has emphasized that the upper Great Lakes are good places to load midwestern foodstuffs for export, and that they ought to be allowed to enjoy their natural economic advantages. Milwaukee has a comparative advantage, however, only if we conceive the P.L. 480 program as an unalloyed gift to foreign peoples. A Congress bent on delivering the maximum amount of food to starving persons, given budgetary limitations, would allow the KCCO to pick the "real" lowest landed cost, which would mean sending more food through the upper Great Lakes. Few statutes have only one objective or one set of beneficiaries. Sections 1241(b)(1) and 1241f show that P.L. 480 has three beneficiaries: the starving, American farmers, and the owners of American ships. Shipowners provided political support for the P.L. 480 program at a price: work for domestic vessels. Wise or not, the preference is there. Federal officials are entitled to use the method they have selected to set aside 75% of the cargoes for U.S.-flag vessels. The injunction issued by the district court accordingly is

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1989.

Before

Hon. FRANK H. EASTERBROOK Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. J. SMITH HENLEY, Senior Circuit Judge*

CITY OF MILWAUKEE, et al., Plaintiffs-Appellees, Cross-Appellants, Nos. 88-3034, 88-3198, and 88-3213 vs. CLAYTON K. YEUTTER, SECRETARY OF AGRICULTURE, et al., Defendants-Appellants, Cross-Appellees.	Appeals from the United States District Court for the Eastern District of Wisconsin. No. 85-C-1509 ROBERT W. WARREN, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, ___ Division, and was argued by counsel.

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* Honorable J. Smith Henley, of the Eighth Circuit, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this date. City of Milwaukee is to pay all costs.

Copy mailed to attorneys for parties by the Court pursuant to Rule 77 (d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CITY OF MILWAUKEE, WISCONSIN, et al.,

Plaintiff,

v. Case No. 85-C-1509

JOHN R. BLOCK, in his official capacity as Secretary of the United States Department of Agriculture and as Chairman of the USDA Commodity Credit Corporation, et al.,

Defendants,

and

TRANSPORTATION INSTITUTE, et al.,

Defendant-Intervenors.

DECISION AND ORDER
(Filed Sep 14, 1988)

In a *Decision and Order* dated June 15, 1988, the Court found that the federal defendants in the above-named case were applying the so-called Availability Clause of the Cargo Preference Act, 46 U.S.C. § 1241(b), in a manner that violated the plain language of the Act. The Court

held that the Cargo Preference Act required an application of the Availability Clause by "geographic area," as opposed to the national application then being implemented by the federal defendants. The Court further ruled that on the basis of the Court's decision, the plaintiffs were entitled to judgment on the first cause of action of their complaint. The Court then set a schedule for the submission of proposed wording of the judgment and briefs on any outstanding legal matters. In the interim, the parties submitted proposed judgments, as well as briefs on various legal issues affecting the wording and entry of the judgment. Also in the interim, the Court entered a temporary restraining order and a preliminary injunction. *See* written decisions of the Court dated July 2 and July 15, 1988.

The wording of the judgment, as well as the other various legal issues raised by the parties, are discussed below. In accordance with the Court's June 15, 1988, decision, and the discussion below, the Court will order judgment entered in favor of the plaintiffs.

I. *AVAILABILITY OF INJUNCTIVE RELIEF*

The federal defendants contend that injunctive relief is not available to the plaintiffs since 15 U.S.C. § 714b(c) provides that no injunction shall be issued against the Commodity Credit Corporation or its property. In the previous decisions, the Court said it was unpersuaded that injunctive relief was barred by § 714b(c) where the agency's administrator acted beyond the scope of the authority delegated to him. *See* June 15, 1988 *Decision and Order* at 24, n. 4. The federal defendants continue to

oppose this view, arguing that the plain words of § 714b(c) state that no injunction shall be issued against the Corporation.

The authority cited by the federal defendant in support of this position does not include any case dealing with an employee of the Commodity Credit Corporation acting beyond the scope of the authority delegated to him or her. Plaintiffs, however, cite to a relatively recent slip opinion from the United States District Court for the Northern District of Georgia, which squarely addresses the issue raised herein. In that case, *Alimenta v. Lyng*, Case No. C87-1495A, Slip Op. (N.D. Ga. September 3, 1987), the court held that § 714b(c) did not deprive the court of its authority to enjoin *ultra vires* or unconstitutional conduct of government officials:

> The plaintiffs argue that they have not named the CCC [Commodity Credit Corporation] as a party and that they are not seeking injunctive relief against the CCC or its property, and therefore, § 714b(c) is not applicable. The defendants' position is that although plaintiffs have not named the CCC as a defendant, by enjoining the defendants' actions as officers, administrators or agents of the CCC, plaintiffs are seeking injunctive relief which is tantamount to an injunction against the CCC. Although the issue is far from clear, the Court does not believe § 714b(c) precludes the Court from enjoining these defendants' actions taken pursuant to 7 U.S.C. § 1359(p)(3). *See e.g., Mitchell v. Block*, 551 F. Supp. 1011 (E.D. Va. 1982), *but see, e.g., Browning v. U.S.D.A.*, Civil Action No. 86-0193-L(B) (W.D. Ky. 1986), *Bauck v. U.S.A.*, No. 86-4210 (D. Kan. 1986). *See also Iowa ex. rel. Miller v. Block*, 771 F.2d 347, 348 n. (8th Cir. 1985).

> Assuming arguendo that § 714b(c) is applicable to the defendants' actions in this case, the Court finds that injunctive relief is still appropriate. The Court believes that § 714b(c) is merely a limited waiver of immunity. *Cf. Romeo v. United States*, 462 F.2d 1036, 1037-38 (5th 1972); *Related Industries, Inc. v. United States*, 2 Cl.Ct. 517, 522 (1983). As such, § 714b(c) does not grant defendants protection against injunctive relief, it merely preserves their immunity.
>
> Sovereign immunity does not preclude injunctive relief against a governmental official's action that exceeds his statutory authority, violates restrictions which the sovereign has placed on his conduct or is repugnant to the Constitution. *See e.g., Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); Larson v. Domestic and foreign Corp., 337 U.S. 682, 689 (1948); *Graham v. United States*, 528 F. Supp. 933, 937 (E.D. Pa. 1981)."

Slip. Op. at 13-14.

Based on this reasoning, as well as that put forth by this Court in its previous decisions in this case, the Court holds that the injunctive relief sought in this case – preventing the the [sic] federal defendants from acting beyond the scope of their lawful authority – is not barred by § 714b(c).

II. *RECONSIDERATION OF JUNE 15 DECISION*

The federal and intervenor defendants seek to have the Court reconsider its conclusion in the June 15 decision that the Availability Clause was to be applied by geographic area. The defendants contend that the legislative history of the Cargo Preference Act establishes that

the term "by geographic area" was meant to apply to points of destination. They further claim that once that phrase is read to apply to destination, a national application of the Availability Clause becomes appropriate.

The Court remains unpersuaded that the plain words of the Act and its legislative history require that the term "by geographic area" apply to points of destination. As the Court found in its June 15 decision, many of the passages of the legislative history support conflicting interpretations on the application of the Availability Clause. June 15 *Decision and Order* at 18. But the pervasive and persuasive view appears to be flexibility in the application of the mandated percentages. Thus, the Court would continue in its position that the legislative history does manifest a clearly expressed legislative intent that that [sic] the words "by geographic area" were meant to apply solely to points of destination. The Court also would note, as it did in the June 15 decision, that a national application of the Availability Clause has the potential of making the entire clause meaningless unless no United States-flag ships exist at any United States port.

III. *SCOPE OF THE INJUNCTION*

Several issues are raised by the parties as to the scope of the injunction. Chief among these issues is whether the judgment should include instructions as to "subtracting out" and "containerization." "Subtracting out" is the term the parties have used for the effect of "unavailable" cargo on the mandated percentage of the Act. If United States-flag ships are not available, the tonnage of cargo

that then is placed on foreign-flag ship is subtracted from the calculation for determining whether the percentage mandated by the Act has been met. On this issue, plaintiffs claim that in order for the Availability Clause to have any effect, "subtracting out" must be included in the Court's injunction. Otherwise, the loss of tonnage will be made up at another time and the clause is nullified. The intervenor defendants respond that "subtracting out" conflicts with the plain wording and purpose of the statute, which requires that the Availability Clause be applied "in such manner as will insure a fair and reasonable participation of United State-flag [sic] commercial vessels in such cargoes by geographic areas." The intervenor defendants ask how this language of inclusion for United State-flag [sic] ship can be construed to require exclusion from the mandated percentage of that cargo which goes on foreign-flag ships.

"Containerization" is the term used by the parties when discussing the advancements in moving cargo by train from one area of the country to another without the cargo being spoiled. The intervenor defendants request that the judgment reflect that "availability" by geographic area under the Act can be achieved through these "intermodal movements."

> Prior to containerization, when goods did not move easily port to port, the vessel, in order to be declared available, would have to be able to load the commodity at a port proximate to its origination. Goods moved from ports nearby. If apples were to be shipped from Washington State to Japan, a vessel in New Orleans bound for Japan would not have been considered available because the cargo could not move on that vessel – the movement would be late, the goods

> might spoil. It would not have been practical. Thus the words of the statute had meaning so long as they were interpreted in relationship to the needs of the cargo to be moved.
>
> Clearly, as the court perceived, the advances of containerization do change that reality. But the meaning of the words in the statute can accommodate that change. In 1954 it might not have made sense to declare that an accessible or procurable vessel anywhere in the United States "available." Now, with containerization, the ship comes to the cargo, rather than the cargo to the ship. [sic – with containerization, the cargo goes to the ship rather that the ship going to the cargo] So long as the cargo can move in a commercially acceptable manner, the words of the statute are still given meaning. The meaning is the same as in 1954 – if a United States-flag vessel can move the cargo in a commercially acceptable manner, it is available."

Memorandum of Defendant-Intervenors in Support of Proposed Judgment and in Opposition to Plaintiffs' Proposed Judgment at 8-9. Plaintiffs respond that they do not oppose the government's use of advancements in "intermodal advancements," but rather they oppose use of those advancements as a manner of circumventing the limitations of the Availability Clause. They argue that the government defendants cannot make United States-flag ship artificially "available" by resorting to intermodal transportation.

The Court declines to include any express wording in the judgment as to "subtracting out" and "containerization." It would be premature for the Court to determine at this time that the federal defendants use of (or failure to use) either "subtracting out" or "containerization" in

regulations yet to be formulated in accordance with the Court's decision would contravene the wording and purpose of the Cargo Preference Act. Plaintiffs and intervenor defendants both make well-reasoned arguments on how the use or disuse of "subtracting out" and "containerization" can conflict with the statute. But at this time those arguments are hypothetical. This Court is not in a position to require that a specific method of "subtracting out" be used if the Availability Clause can be given full effect through another method. Likewise, the Court cannot mandate that advancements in "containerization" be ignored, particularly if it reduces costs within a geographic area. The Court, however, will require that the federal defendants' use or disuse of either of these concepts be undertaken in a manner that does not contravene the Court's determination that the Availability Clause be applied by geographic area, rather than on a national basis.

This reasoning also will follow on the other issues raised by the parties as to the scope of the injunction. The Court will not dictate the exact regulations that the federal defendants must now implement. The Court's declaratory and injunctive relief will be limited to an order that the federal defendants when implementing the Title II, P.L. 480 program in accordance with the Cargo Preference Act, consider availability by geographic area, rather than on a national basis. Furthermore, the Court makes no determination on the effect of the Cargo Preference Act's 1985 amendments dealing with set asides for the Great Lakes ports. The amendments, enacted 31 years after the Cargo Preference Act, do not appear to have any direct relevance on the federal defendants' interpretation of the

Availability Clause. In any event, the amendments leave the implementation of that set aside to the Secretary of Transportation and, unless his or her implementation of the set aside runs contrary to the Availability Clause of the Act, it is not for this court to interfere with that implementation.

Finally, while the Court's declaratory relief will find that the federal defendants' interpretation of the Availability Clause of the Cargo Preference Act on a nationwide basis was in error, the injunctive relief will be limited to the federal defendants' implementation of the Title II, P.L. 480 program since no other program has been under consideration in this lawsuit.

IV. *WORDING OF THE JUDGMENT*

The Court will order that judgment be entered as follows:

> This matter having come before the Court following remand of the case from the United States Court of Appeals for the Seventh Circuit, the following issues remained in dispute: (1) plaintiffs' claim that the federal defendants' actions, in applying the Availability Clause of the Cargo Preference Act, 46 U.S.C. §1241(b), on a nationwide basis in the implementation of Title II of the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. §§1721-1726 (also called "Title II, P.L. 480"), as set forth in 52 Fed. Reg. 5726 (Feb. 25, 1987) (amending 7 C.F.R. Part 1496), was arbitrary, capricious, an abuse of discretion or otherwise not in accordance of law; and (2) plaintiffs' claim that nationwide implementation by the federal defendants violated the Port Preference Clause,

art. I, section 9, cl. 6, of the United States Constitution.

The issues in dispute were purely legal in nature and were considered by the Court, after briefing, in written decisions issued June 15, July 2, July 15 and September 14, 1988. Based on the Court's consideration and resolution of the purely legal issues therein,

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That the federal defendants' application of the Cargo Preference Act's Availability Clause on a nationwide basis in implementing the Title II, P.L. 480 commodities program is contrary to the plain wording of the Act requiring that the Availability Clause be applied by geographic area and, as such, is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law;

2. That the federal defendants' application of the Cargo Preference Act' Availability Clause [sic] on a nationwide basis in implementing the Title II, P.L. 480 commodities program is not contrary to or in violation of the Port Preference Clause of the United States Constitution; and

3. That the federal defendants RICHARD LYNG, in his official capacity as Secretary of the United States Department of Agriculture and as Chairman of the USDA Commodity Credit Corporation; EVERETT RANK, in his capacity as Administrator of the USDA's Agriculture Stabilization and Conservation Service and as Executive Vice President of the USDA's Commodity Credit Corporation; MERRILL D. MARMAN, in his capacity as Deputy Administrator for Commodity Operations, USDA Agriculture Stabilization and Conservation Service; ROBERT H. SINDT, in his capacity as Assistant Deputy

Administrator for Commodity Operations, USDA Agriculture Stabilization and Conservation Services; NORMAN HOUSER, in his capacity as Director, Kansas City Commodity Office, USDA Agriculture Stabilization and Conservation Service; ELIZABETH DOLE, in her capacity as Secretary of the United States Department of Transportation; GARRET E. BROWN, in his capacity as Acting Administrator of the Maritime Administration, United States Department of Transportation; GEORGE P. SCHULTZ, in his capacity as Secretary of the United States Department of State; and M. PETER McPERSON, in his capacity as Administrator, Agency for International Development Corporation, and as Director, International Development Corporation Agency, United States Department of State; their agents and successors; are hereby **PERMANENTLY ENJOINED** from implementing the Title II, P.L. 480 commodities program in a manner contrary to the Cargo Preference Act; to wit: applying the Act's Availability Clause on a nationwide basis, as in the current two-step regulations set forth in 52 Fed. Reg. 5726 (Feb.25, 1987) (amending 7 C.F.R. Part 1496) or in any other manner contrary to the Court's June 15, 1988 *Decision and Order,* which found that the Availability Clause was to be applied by geographic area.

Furthermore, the Court hereby DISSOLVES the preliminary injunction entered July 15, 1988 and ORDERS the Clerk of Court to return to plaintiffs the security posted pursuant to the Court's order entering the preliminary injunction.

SO ORDERED this 14th day of September, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2087

CITY OF MILWAUKEE, et al.,

Plaintiffs-Appellants,

v.

JOHN R. BLOCK, Secretary of Agriculture, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 85 C 1509 – **Robert W. Warren** *Judge.*

ARGUED JANUARY 15, 1987 – DECIDED JULY 14, 1987

Before WOOD, JR. and FLAUM, *Circuit Judges,* and GRANT, *Senior District Judge.**

FLAUM, *Circuit Judge.* In *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), the Supreme Court stated that parties have standing to challenge the legality or constitutionality of federal agency actions if they assert interests "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question," *id.* at 153. Our cases have interpreted this statement as a strict limitation

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* The Honorable Robert A. Grant, Senior District Judge for the United States District Court for the Northern District of Indiana, is sitting by designation.

on standing. Applying our previous decisions, the district court dismissed the present lawsuit for lack of standing. In light of the Supreme Court's recent decision in *Clarke v. Securities Industry Association*, 107 S.Ct. 750 (1987), however, we conclude that our prior cases do not correctly reflect the Supreme Court's teaching in *Date Processing*, and that the judgment of the district court must, therefore, be reversed.

I.

Title II of the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. § 1721 (1982), established a program under which the United States government donates agricultural commodities to needy foreign nations. These commodities are purchased by the Commodity Credit Corporation (CCC), a federally-chartered corporation, and shipped abroad from ports throughout the United States. The Title II program is subject to the provisions of the Cargo Preference Act, 46 U.S.C. § 1241(b)(1) (1982), which requires that a significant portion of these commodities be shipped on United States-flag vessels.[1] The Title II program is also subject to CCC regulations governing the awarding of contracts for the purchase and shipment of the commodities.

The plaintiffs, who represent various interests involved in shipping Title II cargo from ports on the

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[1] "United States-flag vessels" are vessels registered in the United States and owned by United States citizens or entities.

Great Lakes,[2] claim that the government defendants, who are responsible for administering the Title II program, have violated the Cargo Preference Act, the CCC regulations, and the Port Preference Clause of the United States Constitution, U.S. Const. Art. I § 9 cl. 6.[3] They brought this action, seeking both declaratory and injunctive relief. Five maritime defendants, who operate United States-flag vessels which serve ports outside the Great Lakes region, and who represent workers employed on these vessels, were later allowed to intervene.

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[2] The eighteen plaintiffs in this action include four operators of Great Lakes ports; six labor unions representing longshoremen working at harbor facilities of various Great Lakes ports; four stevedoring service and terminal operation companies servicing various Great Lakes ports; two foreign-flag shippers and their agent; and one trade association representing ports, stevedores, terminal and warehousing companies, and steamship lines and agents involved in commercial ocean shipping in the Great Lakes.

[3] The plaintiffs also allege that, in implementing the Title II program, the government defendants have:(1) violated their obligation under Title II to maximize the use of allocated funds to purchase commodities by misinterpreting the requirements of the Cargo Preference Act; (2) acted arbitrarily and capriciously and abused their discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 706 (1982); (3) acted beyond the scope of their authority in violation of § 706 ; and (4) violated the Due Process Clause of the Fifth Amendment.

We need address none of the above claims. The plaintiffs' Title II claim essentially restates their claim that the defendants have misconstrued the provisions of the Cargo Preference Act. The plaintiffs' Administrative Procedure Act claims add nothing to the complaint. Section 706 is not a substantive grant of

(Continued on following page)

THE CARGO PREFERENCE ACT

The plaintiffs claim that the defendants have violated the Cargo Preference Act. The Act requires that, whenever the federal government contracts to purchase and transport agricultural commodities to overseas nations, as it does in the Title II program, the federal agencies involved (in this case the CCC) are to make certain that a minimum percentage of the commodities will be transported on "privately owned United States-flag commercial vessels, *to the extent such vessels are available* at fair and reasonable rates," 46 U.S.C. § 1241(b)(1) (1982) (emphasis added). At the time that this lawsuit was filed, the minimum percentage was 50% of the gross tonnage of all commodities donated by the federal government. *See id.*

The meaning of the words "to the extent such vessels are available" – the so-called Availability Clause – is at the center of this lawsuit. Private United States-flag commercial vessels do not serve the Great Lakes ports. The plaintiffs contend that because United States-flag ships are not "available" at the Great Lakes ports these ports are exempt from the statutory minimum. They argue that the statutory minimum applies only at ports served by United States-flag vessels. The plaintiffs, therefore, seek to have the defendants ship the Title II commodities from ports in the Great Lakes region using foreign-flag shippers.

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rights to individuals. Rather, that section governs our standard of review. The plaintiffs did not pursue their due process claim before the district court.

The government defendants have interpreted the Cargo Preference Act in a different manner. They contend that the Act's minimum percentage applies on a nationwide basis. In their view, if United States-flag ships are not available at the Great Lakes ports, then a sufficient amount of Title II commodities must be shipped through other domestic ports that are served by United States-flag ships in order to achieve the cargo preference percentage on a nationwide basis. As a result of their interpretation of the Act, the defendants have shipped less Title II cargo through the Great Lakes ports than they would have had they followed the plaintiffs' interpretation.

In December 1985, Congress amended the Cargo Preference Act. This amendment increased the portion of donated commodities to be shipped by United States-flag ships from 50% to 75% with the increase to be phased in over a three-year period. *See* 46 U.S.C. § 1241f(a) (West Supp. 1987). The legislation also provided that, despite the required increase in the use of United States-flag ships, the government was to maintain either the percentage share or the metric tonnage of Title II commodities shipped through the Great Lakes ports at its 1984 level. *See id.* at § 1241f(c).

CCC Regulations

In addition to their statutory claim, the plaintiffs assert that, in administering the Title II program, the defendants have not complied with the regulations promulgated by the CCC governing the awarding of contracts for the purchase and shipment of Title II

commodities. At the time this suit was filed, these regulations provided that the CCC would award contracts based on the "lowest landed cost." The agency defined this as the lowest combined cost of purchasing the commodities, transporting them to a specific port, and shipping them to the recipient nation. *See* 7 C.F.R. 1496.5(a) (1986). In 1984, the CCC specifically stated that Title II cargo allocated to the Great Lakes ports under the lowest landed cost method would not be diverted to other ports in order to meet the Cargo Preference Act percentage on a nationwide basis.

The plaintiffs contend that the defendant CCC has violated its own regulations. According to the plaintiffs, in August and September of 1985, the CCC diverted commodities, which under the lowest landed cost formula would have gone to the Great Lakes ports, to other ports. The agency allegedly diverted cargo in two ways. First, the agency purchased commodities outside the Great Lakes region, even though less expensive commodities were available within the region. These commodities were then shipped abroad from ports outside the Great Lakes region. Second, the agency purchased commodities within the Great Lakes region, transported them by rail to ports outside the region, and then shipped them abroad on United States-flag vessels, even though lower-cost foreign flag vessels were available within the Great Lake region.

The CCC has recently promulgated new regulations governing the operation of the Title II program. Under these regulations, the CCC will continue to award purchase and shipping contracts using the lowest landed cost method. However, the CCC will not divide the bidding

process into two steps. In the first step, the CCC will calculate the lowest landed cost using only higher-priced United States-flag ship rates for the portion of its commodities that it believes is necessary to meet its obligations under the Cargo Preference Act on a nationwide basis. *See* 52 Fed. Reg. 5726 (Feb. 25, 1987) (amending 7 C.F.R. § 1496.5(a)). In the second step, foreign-flag ships will be able to complete with United States-flag ships for the remaining cargo. Because no United States-flag ships serve the Great Lakes region, no cargo will be assigned to the Great Lakes ports in the first stage of the process. As a result, there will be no future diversions of Title II cargo which would otherwise go to the Great Lakes ports. The maritime defendants have suggested that this change renders the case moot.

District Court Decision

The plaintiffs filed this suit in October, 1985. They prayed for a declaration that the defendants' diversion of cargo had violated the Cargo Preference Act, the CCC's regulations, and the Port Preference Clause of the United States Constitution. The plaintiffs also sought a declaration that, because United States-flag ships are not available in the Great Lakes region, the minimum United States-flag percentage mandated by the Cargo Preference Act does not apply to Title II cargo shipped through the Great Lakes ports. Finally, the plaintiffs requested an injunction requiring the defendants to administer the Title II program in accordance with the requirements of the Cargo Preference Act and the CCC's regulations. The plaintiffs subsequently moved for summary judgment.

The defendants responded to the plaintiffs' motion by asserting that the plaintiffs lacked standing. Relying on previous decisions of this court, the district court sought to determine whether the plaintiffs had standing by scrutinizing whether they were within the "zone of interest" protected or regulated by the statutory and constitutional provisions at issue. The district court concluded that the plaintiffs did not have standing under the Cargo Preference Act to contest the defendants' interpretation of the act's Availability Clause because the clause did not "directly regulate" them or seek to seek to "protect the[ir] interests." *City of Milwaukee v. Block*, 634 F.Supp. 760, 765 (E.D. Wis. 1986). Although the court recognized that the 1985 amendment to the Cargo Preference Act was intended to mitigate the harsh effects of the Act on the Great Lakes ports, it held that this evidence was not relevant to the question of whether the plaintiffs were within the zone of interest of the Availability Clause. *See id.* at 766.[4] Based on its conclusion that the plaintiffs lacked standing, the district court granted summary judgment in favor of the defendants.

The plaintiffs appealed the decision of the district court. This case was set for oral argument on January 15, 1987. The day before, however, the Supreme Court announced its decision in *Clarke v. Securities Industries*

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[4] The district court also held that the plaintiffs lacked standing under Title II to object to the administration of that program because they were neither "one of the stated parties on whose behalf the legislation was enacted" nor in "compet[ition] with the stated parties," *id.* The district court dismissed the plaintiff's Administrative Procedure Act and Port Preference Clause claims in a footnote. *See id.* at 767 n.4.

Association, 107 S.Ct. 750 (1987). *Clarke* provided the Court's most definite explanation regarding standing to challenge administrative agency actions, and has required us to reexamine our previous decisions on this subject.

On February 25, 1987, while this case was under advisement, the CCC promulgated its new regulations providing for a two-step bidding process for Title II cargo. *See supra* at 5-6. The new CCC regulations were to be used to conduct the CCC's next monthly contract awarding process, scheduled to take place on March 10, 1987. On March 9, the plaintiffs asked this court to enjoin the CCC from using the new regulations to conduct the March contracting. In an unpublished order, we declined to do so. The following day, the maritime defendants moved to have this action dismissed on the ground that the CCC's new regulations had rendered the case moot.

II.

We first address the maritime defendants' assertion that this case is moot. The maritime defendants argue that, under the CCC's new two-step procedure for awarding contracts, there will be no future diversion of cargo from the Great Lakes. They conclude that, as a result, there is no remaining controversy between the parties. In order to determine whether this case is moot, we must examine the claims that the plaintiffs make and the relief that they seek in order to resolve whether the parties will be "affected by any view [a] [c]ourt might express on the merits of this controversy." *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974).

We conclude that the plaintiffs' claim that the government defendants failed to comply with CCC regulations is moot. The allegedly-ignored regulations have been repealed; we have no reason to believe that the government defendants will not comply with their new guidelines. *See Kremens v. Bartley*, 431 U.S. 119, 129 (1977); *Benkendorf v. City of Hazel Crest*, 804 F.2d 99, 101 (7th Cir. 1986).

We also conclude, however, that the plaintiffs' claim that the defendants have misinterpreted the Cargo Preference Act, and their claim that the defendants' interpretation of the Act is unconstitutional, are not moot. The maritime defendants correctly observe that the plaintiffs have framed much of their complaint in terms of the CCC's diversions of cargo. However, the plaintiffs' complaint is not limited to this issue. The central issue in this dispute is the interpretation of the Cargo Preference Act. The defendants believe that the minimum United States-flag vessel percentage mandated by the Act must be achieved on a nationwide basis. The plaintiffs argue that this view violates both the Act and the Constitution. They contend that, under the Availability Clause, the Cargo Preference Act minimum does not apply at any port that is not served by United States-flag vessels.

The new CCC regulations have not altered the defendants' interpretation of the Cargo Preference Act. On the contrary, the first step of the new regulations requires the CCC to allocate a sufficient amount of cargo to United States-flag vessels to meet the Cargo Preference Act minimum on a nationwide basis. The result is that the CCC continues to ship less cargo through the Great Lakes

ports than it would if it had adopted the plaintiffs' interpretation of the Act.

A decision on the merits of the plaintiffs' statutory and constitutional claims will still affect the rights of the parties. *See Keyishian v. Board of Regents*, 385 U.S. 589, 596 (1967). If the courts interpret the Cargo Preference Act in the manner proposed by the plaintiffs, the plaintiffs will be entitled to declaratory and injunctive relief which will require the defendants to ship more Title II commodities through the Great Lakes ports. The plaintiffs' statutory and constitutional claims therefore are not moot.

III.

We next consider the question of standing. The plaintiffs are contesting the actions of a federal administrative agency. The question of standing, therefore, is controlled not only by Article III of the Constitution, but by § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982).[5]

In order to meet the standing requirement of Article III, a plaintiff must demonstrate that he or she "personally has suffered some actual or threatened injury," *Gladstone, Realtor v. Village of Bellwood*, 441 U.S. 91, 99 (1979), that the injury "fairly can be traced to the [defendant's] challenged action." *Simon v. Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976), and that the alleged injury "is likely to be redressed by a favorable decision,"

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[5] Section 10 provides that: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1982).

id. at 38. Although these requirements provide the "irreducible minimum" necessary for standing. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982), the federal courts have added additional prudential limitations, *see, e.g., id.* at 474-75 (no standing to assert "generalized grievances"). Nonetheless, the Supreme Court has consistently recognized that, within the bounds of Article III, Congress may displace these court-imposed restrictions. *See Gladstone, Realtors*, 441 U.S. at 103 n.9 (1979). Once Congress does so, the federal courts have no license to impose additional requirements.

In enacting § 10 of the Administrative Procedure Act, Congress exercised its power to control standing to contest federal administrative agency action. In doing so, Congress intended to displace the usual prudential limits on standing. *See Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970); *FAIC Securities v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985). In determining whether parties have standing to contest administrative agency action, therefore, the task of the federal courts is to determine that the requirements of Article III are met, and that the intent of Congress is complied with.

The federal courts initially interpreted § 10 narrowly, holding that a plaintiff seeking to contest agency action had to have a legal interest provided by statute or common law, or that a statute had to expressly grant standing. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), however, the Supreme Court rejected this narrow interpretation. The *Data Processing* Court explained that the question of standing is separate

from the question of whether the plaintiff has a legal interest. The question of whether the plaintiff has a legal interest, the court noted, concerns whether the party is entitled to relief. *See id.* at 153. In contrast, standing concerns the broader question of whether a party may seek relief. The Court conceptualized standing as a question of "whether the interest sought to be protected by the complaint is arguably within the zone of interest to be protected or regulated by the statutory or constitutional guarantee in question." *Id.* Although the Court did not elaborate on the "zone of interest" concept, it indicated that § 10 was a broad grant of standing, intended to "enlarge . . . the class of people who may protest administrative action," *id.* at 154.[6]

Although the *Data Processing* Court had sought to broaden the range of parties who had standing to contest federal agency action, decisions of this court interpreted the zone of interest concept as a restrictive test. *See, e.g., Peoples Gas, Light & Coke Company v. United States Postal Service,* 658 F.2d 1182, 1195 n.10 (7th Cir. 1981). Our analysis focused on the plaintiffs themselves, rather than the interests they were asserting. We held that plaintiffs

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[6] The Supreme Court did not clarify the zone of interest concept in subsequent standing cases. Indeed, in many cases the Court omitted any mention of it. *See* 4 Davis, *Administrative Law Treatise* § 24:17 at 275 (2d ed. 1983). Instead, the Court often focused directly on whether, in enacting a given statute, Congress had intended to limit the broad review provision contained in the Administrative Procedure Act. *See, e.g., Japan Whaling Association v. American Cetacean Society,* 106 S.Ct. 2860, 2867 n.4 (1986); *Block v. Community Nutrition Institute,* 467 U.S. 340, 347 (1984).

lacked standing to challenge the actions of federal administrative agencies in carrying out their statutory duties unless the plaintiffs demonstrated that they were either protected by that statutory provision, *see, e.g., Dialysis Centers, Ltd. v. Schweiller,* 657 F.2d 135, 138 (1981), or that they were regulated by it, *see, e.g., Fire Equipment Manufacturers Association v. Marshall,* 679 F.2d 679 (7th Cir. 1982), *cert. denied,* 459 U.S. 1105 (1983). We added an additional requirement, holding that when plaintiffs sued to contest an agency action under one provision of a statute, they had to prove that they fell within the zone of interest of that specific provision; they could not rely on other provisions of the statute, "which may evidence different concerns, to expand the zone of interest," *Alschuler v. Department of Housing and Urban Development,* 686 F.2d 472, 480 (7th Cir. 1982).

In *Clarke v. Securities Industry Association,* 107 S.Ct. 750 (1987), the Supreme Court sought to resolve some of the uncertainty surrounding the zone of interest concept. The decision in *Clarke* makes clear that the interpretation of the zone of interest test that we previously employed was too restrictive. The *Clarke* Court recognized that the question of standing to challenge agency action is "basically one of interpreting congressional intent." *Id.* at 754. The Court also made clear that the zone of interest test is merely one tool for a court to use in order to determine this intent. *See id.* at 757. Rather than limiting our analysis to the zone of interest test, *Clarke* requires us to look at all available evidence in order to determine, in each case, whether it may "reasonably be assumed that Congress intended to permit the suit," *id.*

The Supreme Court's decision in *Clarke* indicates the procedure by which the lower courts are to assess congressional intent. Under *Clarke*, we must begin with the presumption that parties who meet the requirements of Article III have standing to contest actions by federal administrative agencies. *See id.* The presumption of standing, although strong, is not irrebuttable. In order to determine whether the presumption has been overcome, we first look to the zone of interest test. This test, although an important part of the standing analysis, "is not meant to be especially demanding," *id.* In order to pass this test, a party need show that it is asserting some interest that has a "plausible relationship," *id.* at 759, to at least one of the concerns that actually motivated Congress to take legislative action. To determine these concerns we must look at all relevant legislation – including other portions of the statute in question and related legislation enacted after the provision at issue. *Id.* at 755, 758. If a party fails the zone of interest test, the presumption of standing is rebutted.

The zone of interest test is only a part of the standing analysis. We must also look to see if there is any other evidence that Congress intended to preclude the plaintiff from suing. *Id.* at 758. This evidence may include "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984). Even if a party satisfies the zone of interest test, it may be precluded from suing if there is convincing evidence that allowing the action would thwart congressional intent.

The standing analysis outlined in this opinion should not be construed to suggest that, under *Clarke*, every party that meets the requirements of Article III and the zone of interest test is permitted to contest any unfavorable administrative agency action. It is critical that a court strike a "balance in a manner favoring review but excluding those would-be plaintiffs" whose suits are likely to disrupt the administrative process. *Clarke*, 107 S.Ct. at 756. Although the Administrative Procedure Act embodies Congress' belief that allowing suits by private individuals is an effective way to ensure agency compliance with law, *see* H. Rep. No. 1980, 79th Cong., 2d Sess. 41, *reprinted in Legislative History of the Administrative Procedure Act*, S. Doc. No. 79th Cong. 248, 2d Sess. 275 (1946), the Act does not grant standing to every party that claims to have been injured by a federal administrative decision. Congress has recognized that allowing parties to obtain judicial review even though they assert interests that are only marginally related to the purpose of a given statute, is "more likely to frustrate than further statutory objectives," *Clarke*, 107 S.Ct. at 756 n.12. In each case, therefore, a court must carefully consider the limitations that we have set forth before it allows a party to contest an administrative agency action.

IV

The plaintiffs' claim that the government defendants' failure to find that United States-flag ships are not "available" on the Great Lakes violates the Cargo Preference Act and Title II. They also assert that the government defendants' administration of Title II violates the Port Preference Clause of the United States Constitution. We

conclude that the plaintiffs have standing under Article III and the Administrative Procedure Act to bring these claims.

A.

The plaintiffs first assert that the defendants have misinterpreted the Availability Clause of the Cargo Preference Act, and that as a result Title II cargo that would have been shipped through the Great Lakes ports has been shipped through other ports. They assert that they have standing under Article III and the Administrative Procedure Act to litigate this claim. Specifically, they claim that their interests are within the zone of interest of the Cargo Preference Act and that there is no evidence of congressional intent to bar this suit.

There is no question that the plaintiffs have standing under Article III to maintain this claim. The plaintiffs, all of whom are directly involved in transporting Title II cargo through the Great Lakes ports, have each suffered an economic injury as the direct result of the government defendants' administration of the Title II program. A decision interpreting the Cargo Preference Act in the manner advocated by the plaintiffs will preclude similar economic injury in the future. Because the plaintiffs have standing under Article III, we must therefore presume that they have standing under the Administrative Procedure Act to contest the defendants' interpretation of the Cargo Preference Act. We therefore look to the zone of interest test, and to other evidence of congressional intent, to see whether either of them rebut this presumption.

The interest that the plaintiffs assert satisfies the zone of interest test. The legislative history of the Cargo Preference Act makes clear that Congress' primary concern was to protect the American merchant marine. However, the legislative history also indicates that, in enacting the Cargo Preference Act, Congress shared the plaintiffs' concern about the effect of this legislation in situations in which no United States-flag ships are available. *See, e.g.*, S. Rep. No. 1584, 83d Cong., 2d Sess. 2 (1954); *Waterborne Cargoes in United States Flag Vessels: Hearings on S.3233 Before the House Comm. on Merchant Marine and Fisheries*, 83rd Cong., 2d Sess. at 14 (1954)(remarks of Rep. Ray); *id.* at 94 (statement of Acting Committee Chairman Tollefson); *id.* at 122-23 (remarks of Rep. Allen). Moreover, Congress specifically demonstrated its concern regarding the effect of the Cargo Preference Act on the Great Lakes program when it enacted the 1985 amendments. *See, e.g.* 131 Cong. Rec. H12376 (conference comm. joint explanatory statement) (daily ed. Dec. 17, 1985); *id.* at H12523 (daily ed. Dec. 18, 1985) (remarks of Rep. Oberstar). Although this amendment was passed long after the original act, *Clarke* makes clear that we may consider subsequent legislative action that is probative of Congress' concern regarding the issue under litigation. *Clarke*, 107 S.Ct. at 755, 758. In this case, the evidence is sufficient to meet the zone of interest test.

In addition we can find no evidence that Congress intended to bar the plaintiffs from bringing this action. Indeed, the evidence is to the contrary. At the time the 1985 amendment to the Cargo Preference Act was adopted, members of Congress were aware of the pendency of this action and made clear that the amendment

was not intended to disturb it. *See, e.g.*, 131 Cong. Rec. H12522 (remarks of Rep. Stangelani) (daily ed. Dec. 18, 1985); *id.* at S18323 (daily ed. Dec. 20, 1985) (remarks of Sen. Boschwitz). We therefore have no difficulty in concluding that the plaintiffs have standing to bring this claim.[7]

B.

The plaintiffs also allege that the government defendants' administration of Title II violates the Port Preference Clause, U.S. Const. Art. I § 9 cl. 6.[8] We conclude that the plaintiffs have standing to litigate this claim.

In *Clarke*, the plaintiffs claimed only that a federal agency had violated a statutory obligation. Here, in contrast, the plaintiffs claim that a federal agency has also violated a constitutional provision. The *Clarke* Court suggested that the requirements for standing might be more stringent in constitutional cases such as challenges to state action, to which the Administrative Procedure Act does not apply. *See Clarke*, 107 S.Ct. at 758 n.16. However,

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[7] The plaintiffs also assert that they have standing under Title II to contest the CCC's interpretation of the Availability Clause. Because we conclude that plaintiffs have standing under the Cargo Preference Act to obtain a judicial interpretation of the Availability Clause, we need not consider whether the plaintiffs also have standing to obtain the same relief under Title II. Such a determination would provide no additional benefit to the plaintiffs.

[8] The Clause provides that "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ." *Id.*

the Court was silent as to the standards that govern challenges to allegedly unconstitutional federal agency action, to which the Administrative Procedure Act does apply. Nonetheless, we believe that the same approach set forth in *Clarke* is appropriate in both statutory and constitutional cases brought under the Administrative Procedure Act. *Cf. Data Processing*, 397 U.S. at 153 (articulating the zone of interest concept in terms of both statutory and constitutional provisions). We must, therefore, determine whether the presumption in favor of judicial review is rebutted by the zero of interest test or by other evidence of congressional intent.

Under the zone of interest test, we must determine whether the interest asserted by the plaintiffs has some relationship to the purposes of the Port Preference Clause. We conclude that it does. The purpose of the Port Preference Clause is to prevent Congress from imposing regulations that would give certain states a competitive advantage over other states. *See Pennsylvania v. Whelling & Belmont Bridge Company*, 59 U.S. (18 How.) 421, 434-35 (1856). This is precisely the interest that the plaintiffs are asserting. In the absence of any reason to believe that Congress has attempted to limit standing to bring this claim, we conclude that plaintiffs have standing to do so.

V.

We conclude that plaintiffs' regulatory claim is moot, that their statutory and constitutional claims are not moot, and that the plaintiffs have standing to bring the

latter claims. The judgment of the district court is therefore REVERSED and the case is REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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RELEVANT STATUTORY PROVISIONS

46 U.S.C. § 1241(b)(1) (relevant portions)

§ 1241. Transportation in American vessels of Government personnel and certain cargoes

(b) Cargoes produced, furnished or financed by United States; waiver in emergencies; exceptions; definition. (1) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any . . . commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such . . . commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such . . . commodities . . . which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-

flag commercial vessels in such cargoes by geographic areas. . . .

46 U.S.C. § 1241f. (relevant portions)

§ 1241f. Shipment requirements for certain exports sponsored by Department of Agriculture

(a) Minimum requirement respecting gross tonnage transported in United States-flag commercial vessels; implementation. (1) In addition to the requirement for United States-flag carriage of a percentage of gross tonnage imposed by section 901(b)(1) of this Act [46 USCS Appx § 1241(b)(1)], 25 percent of the gross tonnage of agricultural commodities or the products thereof specified in subsection (b) shall be transported on United States-flag commercial vessels. (2) In order to achieve an orderly and efficient implementation of the requirement of paragraph (1)(A) an additional quantity equal to 10 percent of the gross tonnage referred to in paragraph (1) shall be transported in United States-flag vessels in calendar year 1986; (B) an additional quantity equal to 20 percent of the gross tonnage shall be transported in such vessels in calendar year 1987; and

(C) an additional quantity equal to 25 percent of the gross tonnage shall be transported in such vessels in calendar year 1988 and in each calendar year thereafter.

(c) Terms and conditions. (1) The requirement for United States-flag transportation imposed by subsection (a) shall be subject to the same terms and conditions as provided in section 901(b) of this Act [46 USCS Appx § 1241(b)].

(2)(A) In order to provide for effective and equitable administration of the cargo preference

laws the calendar year for the purpose of compliance with minimum percentage requirements shall be for 12 month periods commencing April 1, 1986.

(B) In addition, the Secretary of Transportation, in administering this subsection and section 901(b) [46 USCS Appx § 1241(b)], and consistent with these sections, shall take such steps as may be necessary and practicable without detriment to any port range to preserve during calendar years 1986, 1987, 1988, and 1989 the percent share, or metric tonnage of bagged, processed, or fortified commodities, whichever is lower, experienced in calendar year 1984 as determined by the Secretary of Agriculture, of waterborne cargoes exported from Great Lake ports pursuant to title II of the Agricultural Trade Development and Assistance Act of 1954 (7 U.S.C. 1721 et seq.)

RELEVANT ADMINISTRATIVE SECTIONS

7 CFR § 1496.1 (1987)

General statement.

This subpart sets forth the policies, procedures and requirements governing procurement, including allocation to U.S. ports, of processed agricultural commodities for donation under Title II, Pub L. 480.

7 CFR § 1496.2 (1987)

Administration.

(a) The program will be carried out by the Agricultural Stabilization and Conservation Service (referred to in this subpart as "ASCS") under the general supervision and direction of

the Executive Vice President of CCC. The program will be administered through the Office of the Deputy Administrator. Commodity Operations, ASCS, Washington, DC and the Kansas City Commodity Office (KCCO), ASCS, Kansas City Missouri. Procurement will be in accordance with USDA-1, "General Terms and Conditions for the Procurement of Agricultural Commodities or Services", as amended or revised, applicable provisions of the Federal Acquisition Regulations (48 CFR), and applicable purchase announcements and bid invitations.

(b) Purchases are made to fulfill commodity requests received in KCCO from AID.

7 CFR § 1496.3 (1987)

Definitions.

As used in the regulations in this subpart and in the forms and documents related thereto, the following terms shall have the meaning assigned to them in this section.

(a) "AID" means the Agency for International Development, an agency within the United States Department of State.

(b) "ASCS" means the Agricultural Stabilization and Conservation Service, an agency within the United States Department of Agriculture.

(c) "DACO" means the Deputy Administrator, Commodity Operations, ASCS.

(d) "CCC" means Commodity Credit Corporation, a corporate agency within the United States Department of Agriculture.

(e) "Commodity Office" means the Kansas City Commodity Office within ASCS, which is

responsible for assigned inventory management, acquisition, disposition and related program activities of CCC.

(f) "Lowest landed cost" means the lowest combined total cost of the commodity plus transportation charges to the port of discharge.

7 CFR § 1496.5(a) (1987)

Consideration of bids.

(a) *Lowest landed cost.* The general principle of awarding contracts that will result in the lowest landed cost will prevail. Lowest landed cost will be calculated on the basis of U.S. flag rates and service for that portion of the commodities being purchased that CCC determines is necessary and practicable to meet cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being purchased. However, the additional factors set forth in this section will be considered in awarding contracts.

7 CFR § 1496.5(f) (1987)

(f) *Great Lakes ports.* In consultation with the Secretary of Transportation, CCC shall take such steps during calendar years 1986-89 as are necessary and practicable to preserve annually the percentage share or metric tonnage, whichever is lower, of Title II, Pub. L. 480 bagged, processed, or fortified commodities exported from Great Lakes ports during 1984, as determined by the Secretary of Agriculture, consistent with the cargo preference requirements of the Merchant Marine Act, 1936, as amended, and without detriment to other port ranges.

7 CFR § 1496(a) (1985)

General statement.

(a) This subpart sets forth the policies, procedures and requirements governing procurement, including allocation to U.S. ports, of processed agricultural commodities for donation under Title II, Pub. L. 480.

7 CFR § 1496.2(a) (1985)

Administration.

(a) The program will be carried out by the Agricultural Stabilization and Conservation Service (referred to in this subpart as "ASCS") under the general supervision and direction of the Executive Vice President of CCC. The program will be administered through the office of the Deputy Administrator, Commodity Operations and the Procurement and Sales Division, ASCS, Washington, D.C.; and the Kansas City ASCS Commodity Office (KCCO), Shawnee Mission, Kansas. Procurement will be administered in accordance with requirements specified in Title 41 of the Code of Federal Regulations, "Public Contracts and Property Management, Chapter I," in USDA-1, as amended, "General Terms and Conditions for the Procurement of Agricultural Commodities or Services," and CMO-1, as amended. "Specifications for Packaging and Packing of Dairy Products, Processed Grains, Salad Oil and Shortening."

7 CFR § 1496.5(a) (1985)

Consideration of bids.

(a) *Lowest landed cost.* The general principle of awarding contracts that will result in the lowest landed cost will prevail. However, the

following additional factors will be considered in awarding contracts.

RELEVANT LEGISLATIVE HISTORY

Hearing of the Committee on Merchant Marine and Fisheries of the House held on June 23-25, 1954

> Mr. Allen. I was trying to define somewhat the meaning of the phrase: "to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels," particularly with regard to tramp movements in the cross trade. My question being whether in this language it would be mandatory for the United States agency arranging shipping to use an American ship if it were available in this country, taking it in ballast to the foreign country where the foreign shipment would originate and paying the rate that would be reasonable for the United States vessel for that movement. And, while I think it is not intended for the bill to cover such a situation so as to make it mandatory, it seems to me that the language has that effect.
>
> Mr. Greene. Well, I think the word "available" means available in relation to the requirements for the cargo movement. If a cargo is to move from Rotterdam the first week in May, the fact that there may be ships available elsewhere in the world, but not able to move that cargo at the time it is committed and rescheduled and supposed to move, would not render American-flag ships available. On the other hand, if there was an American-flag ship in Amsterdam and by a 1-day run could be in Rotterdam to pick up the cargo, that, I should say would be available. The statute as it now is has a good deal of flexibility, it seems to me, for having good common sense, intelligent administration in such manner as

best to carry out section 101 of the Merchant Marine Act.

Mr. Allen. Well, specifically then, you would say the word "available" is not to be interpreted to cover all the ships that could be available within a time?

Mr. Greene. Within time, no. I think there must be a time factor if there must be availability anywhere.

Mr. Allen. You would limit "available" to mean available at the place or reasonably to the place where the cargo was to be lifted?

Mr. Greene. Yes sir; and in relationship to the time that the cargo is scheduled to be lifted.

Mr. Allen. Any further questions?

Mr. Bonner. The ship would have to be in that geographic area?

Mr. Greene. As a practical matter, I believe so, yes.

Mr. Bonner. That is what I thought that meant.

Mr. Greene. Then there is the additional flexibility of a fair and reasonable rate, because if it were to make a total transocean voyage empty –

Mr. Bonner. That was the discussion. If a ship would have to go in ballast in an oceangoing trip, would it be available?

Mr. Greene. Well, it might in most cases – it would not be available within either the meaning of this legislation or the basic policy of the Merchant Marine Act.

Mr. Allen. Thank you very much. This will conclude the hearings on S. 3233. The committee will stand adjourned.

Waterborne Cargoes in United States-Flag Vessels: Hearings on S. 3233 Before the Comm. on Merchant Marine and Fisheries of the House, 83d Cong., 2d Sess. 123 (1954).

Hearing of the Committee on Merchant Marine and Fisheries of the House held on February 3, 1989

> Mr. Allen: Mr. Thorpe, do you know how this fruit moves from California?
>
> Mr. Thorpe: Yes, sir; it moves to Scandinavia entirely on foreign ships.
>
> * * *
>
> Mr. Allen: Are they all foreign ships?
>
> Mr. Thorpe: All but one. We have one American line, the States marine.
>
> Mr. Allen: Does States Marine make the calls at all of the ports that would be required to be served, or only the United Kingdom?
>
> Mr. Thorpe: I am told that they do not provide service to all of these countries.
>
> Mr. Allen: Do you anticipate, or do you find any difficulty that will be controlling in getting American ships to take 50 percent of the cargo if you should be able to sell under these foreign programs?
>
> Mr. Thorpe: No; we could not possibly under the present service that is available to us, if we wanted to ship 50 percent of the cargo on American ships, because there is only 1 out of some 23 that are in the Pacific Coast European Conference.
>
> Mr. Allen: You are familiar, however, with the provision in the law that says that if American ships are not available foreign ships can be used?

Mr. Thorpe: Yes, sir.

Mr. Allen: Would you anticipate under that escape clause no difficulty in finding transportation?

Mr. Thorpe: If a deal were made, I am sure that we would have no difficulty.

Operation and Administration of the Cargo Preference Act: Hearings on Public Law 664 Before the House Comm. on Merchant Marine and Fisheries, 84th Cong., 2d Sess. 220 (1956)

The Committee's chief counsel, Mr. Casey, then summarized:

Mr. Casey: Since apparently it has been established that there are no liner services under the United States flag from the Pacific coast to Europe and the Scandinavian countries, and the only line you mentioned was States Marine, I understand they have only one ship, for example, sailing between February 2 and March 28, and since the law provides that if American ships are not available at fair and reasonable rates the United States, or any shipper, can ship it on foreign bottoms, then it follows that any shipments that you made of dried fruit from California would undoubtedly go on foreign ships even with the 50-50 legislation; is that so?

Mr. Thorpe: Yes, sir; that is correct.

Id. at 222.